Supreme Court, U.S.
FILED

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MARKO PORTER,

PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MARKO PORTER*
2196 EAST APACHE #102-192
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*PETITIONER, IN PROPRIA PERSONA

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Appellate Court exceeded its standard of review of the Tax Court's grant of the Respondent's Motion for Judgment on the Pleadings when the Appellate Court found facts not alleged or that could not be inferred from the Petition?

2. Whether in exceeded its standard of review, the Appellate Court overlooked the Petitioner's claim that his labor is received as a gift from his Creator and is a gift for income tax purposes?

THE PARTIES

The only parties are those who appear in the caption of the case.

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RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Marko Porter, hereby Petitions this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on May 18, 1995.

OPINION OF THE COURT BELOW

Both the opinion of the Ninth Circuit Court of Appeals (App., Pgs. A-1 to A-2) and the United States Tax Court (App., Pgs. A-5 to A-7) were unpublished opinions and are included in the Appendix.

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment on May 18, 1995 (App., Pgs. A-1 to A-2) affirming the Tax Court's dismissal for failure to state a claim. On June 27, 1995, the Petitioner filed a Petition for Rehearing. On August 8, 1995, the Court of Appeals denied the Petition for Rehearing. (App., Pg. A-3) The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is invoked under the provisions of 28 USC, § 1254(1) and 26 USC, § 7482(a)

STATUTORY PROVISIONS INVOLVED

The following statutes and rules are involved in this petition.[1]

Sec. 61. Gross income defined.

(a) General definition. Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;

1/ All references to the statutes are found in the Internal Revenue Code of 1986 unless otherwise noted.

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10)Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a decedent; and

(15) Income from an interest in an estate or trust.

Sec. 83. Property transferred in connection with performance of services.

(a) General rule. If in connection with the performance of services, property is transferred to any person other that the person for whom such services are performed, the excess of --

(1) the fair market value of such property (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

(2) the amount (if any) paid for such property,

shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise

disposes of such property in an arm's length transaction before his rights in such property because transferable or not subject to a substantial risk of forfeiture.

Sec 165. Losses.

(b) Amount of deduction. For purposes of subsection (a), the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property.

Sec. 1001. Determination of amount of and recognition of gain or loss.

(a). Computation of gain or loss. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

Sec. 1011. Adjusted basis for determining gain or loss.

(a) General rule. The adjusted basis for determining the gain or loss from the sale or other disposition of property, when acquired, shall be the basis (determined under section 1012 or other applicable sections of this subchapter and subchapters C (relating to corporate distributions), and P (relating to capital gains and losses)), adjusted as provided in section 1016.

Sec. 1012. Basis of property -- cost.

The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapter C (relating to corporate distributions and adjustments), K (relating to

partners and partnerships), and P (relating to capital gains and losses). The cost of real property shall not include any amount in the respect of real property taxes which are treated under section 164(d) as imposed on the taxpayer.

Sec. 1015. Basis of property acquired by gifts and transfers to trust.

(a) Gifts after December 31, 1920. If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis (adjusted for the period before the date of the gift as provided in section 1016) is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value. If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to the donee, the Secretary shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Secretary finds it impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the Secretary as of the date or approximate date at which, according to the best information that the Secretary is able to obtain, such property was acquired by such donor or last preceding owner.

Rules of Practice and Procedure
UNITED STATES TAX COURT

Rule 120. Judgment on the Pleadings.

(a) General: After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. The Motion shall be filed and served in accordance with the requirements otherwise applicable. See Rules 50 and 54. Such motion shall be disposed of before trial unless the Court determines otherwise.

(b) Matters Outside Pleadings. If, on a motion for Judgment on the Pleadings, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as a provided in Rule 121, and the parties shall be given an opportunity to present all material made pertinent to a motion under Rule 121.

STATEMENT OF THE CASE AND FACTS

During the year 1990, the Petitioner sold his labor to Saguaro Tire and Auto Service and Arizona Precision Parts, Inc. on each day that he worked. For the year 1990 the Petitioner received $8,411.00 for the sale of his labor to Saguaro Tire and Auto Service. For the year 1990 the Petitioner received $1,688.00 for the sale of his labor to Arizona Precision Parts, Inc. [App., Pg. A-11, ¶ 6(f)][2]

During the year 1991, the Petitioner sold his labor to Patrick Sherman and D.J. Partnership on each day that he worked. For the year 1991 the Petitioner received

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2/ The facts stated herein are taken from the Petition filed in the United States Tax Court. The Tax Court Petition is enclosed in the Appendix to this Petition. [App., Pgs. 9-12]

$8,216.00 for the sale of his labor to Patrick Sherman. Petitioner had basis (cost) of at least $8,216.00 in the labor he sold to Patrick Sherman. For the year 1991 the Petitioner received $1,539.00 for the sale of his labor to D.J. Partnership. Petitioner. Petitioner had a basis (cost) of at least $1,539.00 in the labor he sold to D.J. Partnership. [App., Pg. A-12, ¶ 6(g)].

The following additional facts are essential to the determination of this case and as the forthcoming discussion will show are irrebuttable upon their mere statement. The Petitioner is a Man created by God Almighty. The Petitioner's Life is given to him each day as an endowment (gift) from his Creator. The Petitioner's labor is his property. To the best knowledge of the Petitioner, the Petitioner's Creator is the original owner and creator of the Petitioner's labor. The Petitioner receives this labor each day as a part of the gift of his life. The Petitioner received this gift after December 31, 1920. [App., Pg. A-11, ¶ 6(e)].

On July 14, 1993, the Respondent issued a Notice of Deficiency for the years 1990 and 1991. The Notices set forth deficiencies in the amount of $1,823.00 (1990) and $694.00 (1991) plus penalties and interest. The Deficiencies were based upon the presumption that the Petitioner received "Wages" or "Compensation for Services" for the labor he sold to Saguaro Tire and Auto Service, because of the W-2's issued by Saguaro Tire and Auto Service, Arizona Precision Parts, Inc., Patrick Sherman and D.J. Partnership which declared that the Petitioner was paid "Wages."

On April 29, 1994, the Petitioner filed his formal petition with the United States Tax Court. The Petitioner alleged that the Respondent erred in proceeding as if the Petitioner had a **ZERO** basis (cost) in his labor. [App., Pg. A-10, ¶ 5(d) and (e)]. As they are set forth above the Petitioner then set down sufficient

facts for his claim he had a basis (cost) in his labor that was at least equal to the **FAIR MARKET VALUE** of the labor he sold to Saguaro Tire and Auto Service, Arizona Precision Parts, Inc., Patrick Sherman and D.J. Partnership during the years 1990 and 1991.

On May 20, 1994, the Respondent Answered the Petition. On June 26, 1994, the Respondent filed a Motion for Judgment on the Pleadings. On July 1, 1994, the Tax Court ordered a hearing on the Motion for Judgment on the Pleadings on August 17, 1994. On February 16, 1994, the Petitioner responded to the Motion for Judgment on the Pleadings and submitted a statement in lieu of appearance. On August 17, 1994, the Tax Court held its hearing on the Respondent's Motion. On August 24, 1994, the Court granted the Respondent's Motion and entered its Order of Dismissal and Decision. The reasoning for the dismissal was that the Petitioner's claim that he had a basis (cost) in his labor that is at least equal to the **FAIR MARKET VALUE** of the labor "contained tax protester-type arguments with respect to the deficiencies determined in the notice of deficiency." [App., Pg. A-7]

On September 20, 1994, Petitioner filed a Motion to Vacate or Revise Decision. The Motion was denied on September 27, 1994. On December 23, 1994, Petitioner appealed to the Ninth Circuit Court of Appeals. On May 18, 1995 the Ninth Circuit affirmed the Tax Court's grant of the Motion for Judgment on the Pleadings. [App., A-1 to A-2]. The Court concluded that the Petitioner was claiming that Wages are not income. The Petitioner filed his Petition for Rehearing on July 2, 1995. On August 8, 1995, the Ninth Circuit denied the Petition for Rehearing. [App., Pg. A-3] It is the May 18, 1995 judgment of the Ninth Circuit of Appeals that the Petitioner seeks review in this Court by certiorari.

ARGUMENT

I. THE APPELLATE COURT'S FINDING OF FACTS OUTSIDE THE PLEADINGS WHEN IT AFFIRMED THE TAX COURTS DISMISSAL ON THE RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS WAS DECIDED IN A WAY THAT CONFLICTS WITH SEVERAL RELEVANT DECISIONS OF THIS COURT

When the Respondent is the moving party in a Motion for Judgment on the Pleadings, like a motion to dismiss for failure to state a claim, the trial Court must assume that the facts plead in the non-moving parties pleadings are true. In the instant case the Respondent moved for Judgment on the Pleadings in the United States Tax Court. The Tax Court disposed of it be merely holding "contained tax protester-type arguments with respect to the deficiencies determined in the notice of deficiency."

The Appellate Court correctly analyzed the law regarding the grant of a Motion for Judgment on the pleadings, *i.e.* that "only if, ***on admitted facts***, she is entitled to judgment as a matter of law." (emphasis added) [App., Pg. A-6]. It is for this reason that the facts plead in the Petitioner's Tax Court Petition must be accepted as true, because the Respondent is only entitled to judgment as a matter of law based when facts plead in the Petition are admitted in the answer.

Careful examination of ¶¶ 5 and 6 of Respondent's answer [App., Pg. A-15] shows that she denied the essential facts and allegations in ¶¶ 5 and 6 of the Tax Court Petition. It is these facts that are at the heart of the action now before this Court. Having not admitted to the facts in ¶¶ 5 and 6 of the Petition the Respondent was not entitled to the grant of the Motion for Judgment on the Pleadings.

In order to justify its conclusion that the "facts" in the Petition were admitted, the Court used the presumption that the Commissioners determinations in the Notice of Deficiency are true. This presumption cannot be used to prove the truth of substantive facts that were put at issue by the Respondent's denial of those facts for purposes of deciding the Motion for Judgment on the Pleadings. cf. *Ross v. U.S.*, 92 US 281 (1875) (Presumption of Regularity cannot be used to prove a substantive fact). The presumption cannot be used to cause allegations that were denied by the answer to be treated as admitted. Simply put, **at least for purposes of deciding a Motion for Judgment on the Pleadings**, the facts and allegations set forth in the Tax Court Petition and the Respondent's subsequent denial of those facts in her answer, rebutted the presumption of the Commissioner's determinations in the deficiencies and put the parties to proof with respect to those disputed facts.

The Court of Appeals compounded in rendering its judgment and affirming the grant of the Motion for Judgment on the Pleadings, when it found facts that were never alleged and then based upon those facts applied a conclusion of law that is irrelevant to the case at hand. The Appellate Court made the following findings:

> Porter contends that the **compensation** that he received from his employers is not taxable since he did not receive "wages" within the meaning of the Internal Revenue Code, because the code fails to consider the fair market value of the basis in his labor as a gift from his Creator and Porter can show that his basis in his labor is equal to the amount of the compensation he received. [App., Pg. A-2]

The Appellate Court's reasoning missed the point and in doing so incorrect found that the Petitioner had in **fact** "employers" and received "compensation." No claim or allegation, either in the Tax Court Petition or the Respondent's Answer, raised any issue whether the money received was "wages" or "compensation" or that the Petitioner worked for an "employer." The Court based upon these found "facts" then proceeded to apply the law that has long held that "Wages are includible in gross" income a principle with which this Petitioner agrees and concedes for this Petition.

What must be determined is not whether "wages" are or are not includible in gross income, but whether any Court in this country can declare as a matter of law that "wages" or "compensation" are received simply because someone works for someone else. As will be shown in Argument II below, the Petitioner has contended throughout that whether one receives "wages" or "compensation for services" is a question of fact and not a question of law.

The Commissioner disputed the Petitioner's claims that his labor is his property and is a gift from his Creator at the pleading stage, upon the Commissioner's Motion to for Judgment on the Pleadings. Because they were not challenged in any other way (by way of summary judgment, for example) this court must assume they are true. *Fla. Gen. Contractors v. Jacksonville*, 508 US _____, 124 L.Ed.2d 586, 599, 113 S.Ct. _____, (1993), *citing Lucas v. South Carolina Coastal Council*, 506 US _ ___, _____, n.3, 120 L.Ed. 798, 810-11, n.3, 112 S.Ct 2886 (1992); *Pennell v. San Jose*, 485 US 1, 7, 99 L.Ed.2d 1, 108 S.Ct 849 (1988). Given that presumption and this Court's standard of review, it was inappropriate for the Tax Court to have granted the Motion and for the Ninth Circuit to have affirmed the grant of the Motion and also find facts that were not otherwise plead or that could be

inferred from the pleadings. On remand by this Court, if the Tax Court finds that Petitioners' labor, which is indisputably received as a gift from his Creator, is a gift for income tax purposes, then the Petitioners' application of Internal Revenue Code (IRC), § 1015(a) would establish the Petitioner's basis in his labor.

II. THE APPELLATE COURT'S JUDGMENT IGNORED THE PETITIONER'S CLAIM THAT HIS LABOR, WHICH IS RECEIVED AS A GIFT FROM HIS CREATOR, IS A GIFT FOR INCOME TAX PURPOSES. BECAUSE THE ISSUE IS ONE TO BE DECIDED AS A QUESTION OF FACT THE APPELLATE COURT'S DECISION WAS MADE IN A WAY THAT CONFLICTS WITH SEVERAL RELEVANT DECISIONS OF THIS COURT

As the Tax Court Petition shows, the Petitioner contends that the Respondent erred in proceedings as if the Petitioner had a **ZERO** basis (cost) in the labor that he sold under contract during the years 1987, 1988 and 1989. The Petitioner alleged that he has a basis (cost) at least equal to, if not greater than, the **FAIR MARKET VALUE** of the labor he sold during these years.

The Respondent asserts the **ZERO** basis (cost) in one's labor as an unsupported presumption. See *Some Constitutional Questions Regarding the Federal Income Tax Laws*, Congressional Research Service Report No. 84-168A, by Howard Zaritsky, Updated by John R. Lucky, Page 11; *Frequently Asked Questions Concerning the Federal Income Tax*, Congressional Research Service Report No. 92-303 A, by John R. Luckey, Page 12.

It has long been recognized that a Man's labor, energies and talents are his property and that this property is a gift from his Creator. *Butcher's Union Co. v. Crescent City Co.*, 111 US 746, 756-57, 28 L.Ed. 585, 4 S.Ct. 652 (1884). Quoting first from the "*Unanimous*

Declaration of the thirteen united States of America" (Commonly referred to as the Declaration of Independence) and then from *Adam Smith's, Wealth of Nations*, Book I, Chapter 10 this Court discussed the nature of this "gift."

> "As in our intercourse with our fellow-men, certain principles of morality are **ASSUMED TO EXIST**, without which society would be impossible, so certain **INHERENT RIGHTS** lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: "We hold these truths to be self evident" -- this is so plain that their truth is recognized upon their MERE statement -- "that all men are **ENDOWED**" -- NOT by edicts of Emperors, or decrees of Parliament, or **ACTS OF CONGRESS**, but -- "by their **CREATOR** with certain unalienable rights" -- that is rights which cannot be bartered away, or given away, or taken away, except in punishment of crime -- "and that among these are life, liberty, and the pursuit of happiness, and to secure them" -- not grant but secure them -- "governments are instituted among men, deriving their just powers from the consent of the governed." (*emphasis added*)
> *Butcher's Union*, supra, at 756

> "The **PROPERTY** which every man has, in **HIS OWN LABOR** as it is the **ORIGINAL FOUNDATION** of **ALL OTHER PROPERTY**, so it is the most **SACRED** and inviolable." (*emphasis added*). *id.* at 757

Ultimately the basis (cost) the Petitioner has in his labor is determined after establishing whether the gift of this labor is a gift for income tax purposes. Whether there has been a gift for income tax purposes requires a "detached and disinterested generosity" on the part of the giver *Commissioner v. Duberstein*, 363 US 278, 285, 4 L.Ed. 1218, 80 S.Ct. 1150 (1960) and is decided as a question of fact *Duberstein*, supra, 289-91.

Assuming sufficient factors are presented to make it possible to find that the gift of Petitioner's labor is a gift for income tax purposes, the provisions of IRC, § 1015(a) for determining the basis (cost) in property received by gift apply. There is nothing in the language of the statute or the legislative history of § 1015(a) to show that Congress excluded from the operation of the statute an intangible gift such as a Man's labor. In light of the principle that the Petitioner is exempt from taxation in the absence of clear and unequivocal language *Spreckles Sugar Ref. Co. v. McClain*, 192 US 397, 48 L.Ed. 496, 24 S.Ct. 376 (1904), the Petitioner's construction of IRC, § 1015 is more than reasonable.

In determining the amount of "Wages" or "Compensation" that would then be includible in gross income, the following formula would apply. A - C = W

A refers to the amount received for the sale of labor
C refers to the cost or basis in the labor
W refers to the amount that would be considered "Wages" or "Compensation for Services" which would then be includible in gross income.

Once the adjusted basis (cost) in the Petitioner's labor is calculated under the applicable provisions of IRC, §§ 1001, 1011, 1012 and 1015 and because the transaction at issue deals with the sale or disposition of property, the Petitioner is entitled to arrange his affairs under the provisions of IRC, § 61(a)(3) "Gains derived

from dealings in property" *United States v. Cumberland P.S. Co.*, 338 US 451, 94 L.Ed. 251 70 S.Ct 380 (1950). In *Gregory v. Helvering*, 293 US 465, 79 L.Ed. 596, 55 S.Ct. 266 (1935) and is further entitled, under the provisions of IRC, § 165(b), to deduct that basis (cost) as a loss. *Cottage Savings Association v. Commissioner of Internal Revenue*, 499 US 554, 568, 113 L.Ed.2d 589, 111 S.Ct. 1503 (1991).

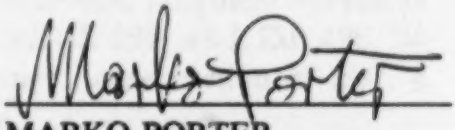
Because the Tax Court and the Appellate Court disposed of the Petition and Appeal at the pleading stage and on an incorrect application of the law, the Petitioner was not entitled to arrange his affairs under the law, and present those factors that would establish that the gift of his labor is a gift for income tax purposes and that he has a basis (cost) in his labor. For those reasons, the Petitioner was not permitted to assert those deductions that he was entitled to under the Internal Revenue Laws.

CONCLUSION

It is patently clear, that the Appellate Court's judgment found facts that were not present or which could be inferred from the pleadings. It is also equally clear that the Court's judgment ignored essential issues to the resolution of this action. In both instances, the Appellate Court's judgment was made in a way the conflicts with several relevant decisions of this Court.

Accordingly and for the forgoing reasons this Court should issue the Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 3rd day of November, 1995.



MARKO PORTER
2196 EAST APACHE #102-192
TEMPE, ARIZONA 85281
(602) 841-4775
Petitioner, In Propria Persona

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MARKO PORTER,

PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARKO PORTER,	)	No. 95-70048
	)	
Petitioner-Appellant,	)	IRS No. 3633-94
	)	
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	Memorandum*
	)	
Respondent-Appellee.	)	

Appeal from the United States Tax Court
Submitted May 16, 1995**
Before: WALLACE, Chief Judge, HUG and NOONAN, Circuit Judges.

Marko Porter appeals pro se the tax court's grant of judgment on the pleadings for the government in Porter's petition for redetermination of federal income tax deficiencies for the 1990 and 1991 tax years. We have jurisdiction pursuant to 26 U.S.C. § 7482, and we affirm.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

Porter contends that the compensation he received from his employers is not taxable since he did not receive any "wages" within the meaning of the Internal Revenue Code, because the Code fails to consider the fair market value of the basis in his labor as a gift from his creator, and Porter can show that his basis in his labor is equal to the amount of compensation he received. The tax court properly rejected this frivolous contention. See Carter v. Commissioner, 784 F.2d 1006, 1009 (9th Cir. 1986), Olson v. United States, 760 F.2d 1003, 1005 (9th Cir. 1985).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARKO PORTER,	)	No. 95-70048
	)	
Petitioner-Appellant,	)	IRS No. 3633-94
	)	
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	ORDER
	)	
Respondent-Appellee.	)	

Before: WALLACE, Chief Judge, HUG and NOONAN, Circuit Judges.

The petition for rehearing is denied.

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UNITED STATES TAX COURT
Washington, D.C. 20217

MARKO A. PORTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 3633-94.
	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
	)	
Respondent.	)	

ORDER AND DECISION

This matter is before the Court on respondent's Motion for Judgment on the Pleadings filed June 29, 1994. The facts pertinent to the disposition of this matter are set forth below.[1]

On November 26, 1993, respondent issued notices of deficiency to Marko A. Porter (petitioner) determining deficiencies in and additions to his Federal income tax for the taxable years and in the amounts as follows:

		Additions to tax	
Year	Deficiency	§ 6651(a)	§ 6654(a)
1990	$1,823	$444	$116
1991	694	168	39

[1] Section references are to the Internal Revenue Code as amended. Rule references are to the Tax Court Rules of Practice and Procedure.

Petitioner filed an imperfect petition and an amended petition with this Court on February 28, 1993, and May 2, 1994, respectively.[2] The amended petition includes allegations that petitioner is a nonresident alien, that petitioner did not receive any U.S. source of income during the years in issue, and that petitioner has a fair market value basis in his labor.

Respondent filed an answer to the amended petition on May 23, 1994. Respondent5 then filed the Motion for Judgment on the Pleadings pending before the Court.

By order dated July 1, 1994, petitioner was notified of the filing of respondent's motion and was advised that a hearing would be conducted in Washington, D.C. on August 17, 1994. The parties were reminded of the applicability of Rule 50(c).

Respondent's motion was called for hearing in Washington, D.C. on August 17, 1994. Counsel for respondent appeared and presented argument on the motion. Petitioner did not appear at the Hearing. On August 17, 1994, but after the hearing, the Court received petitioner's Rule 50(c) statement and petitioner's response to respondent's motion for judgment.

Rule 120(a) provides that after the pleadings are closed and within such time as not to delay the trial, any party may move for judgment on the pleadings. A motion for judgment on the pleadings is appropriate only where the pleadings do not raise a genuine issue of material fact, but rather involve issues of law. Thus, respondent's motion is to be granted only if, on admitted facts, she is entitled to decision as a matter of law. Anthony v. Commissioner, 66 T.C. 367 (1976). The determinations made by respondent in the notice of deficiency are presumed correct; the burden of proof is on petitioner to show that these determinations are erroneous. Rule 142(a); Welch v. Helvering, 290 U.S. 111 (1933); Rockwell v. Commissioner, 512 F.2d 882, 887 (9th Cir.1975), affg. T.C. Memo. 1972-133.

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[2] At the time of filing his petition herein, petitioner resided at Tempe, Arizona.

The amended petition filed herein contains tax protester-type arguments with respect to the deficiencies determined in the notice of deficiency. All of the arguments espoused in the petition have been uniformly rejected by this and other courts. Rowlee v. Commissioner, 80 T.C. 1111 (1983). Additionally, petitioner's Rule 50(c) statement and response to respondent's motion for judgment repeat the same protestor arguments.

The absence in the petition of specific justiciable allegations of error and supporting facts is sufficient to grant a motion for judgment on the pleadings. Abrams v. Commissioner, 82 T.C. 403, 408 (1984). Based on the contents of the petition filed herein, we hold that respondent is entitled to judgment as a matter of law.

Accordingly, upon consideration and for cause, it is

ORDERED: That respondent's Motion for Judgment on the Pleadings is granted. It is further

ORDERED AND DECIDED: That there are deficiencies in and additions to petitioner's Federal income tax for the taxable years and in the amounts as follows:

		Additions to tax	
Year	Deficiency	§ 6651(a)	§ 6654(a)
1990	$1,823	$444	$116
1991	694	168	39

Peter J. Panuthos
Chief Special Trial Judge

Entered: Aug 24 1994

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MARKO PORTER
c/o 2196 East Apache #102-192
Tempe, Arizona 85281

Petitioner, In Pro Per

UNITED STATES TAX COURT

MARKO PORTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 3633-94.
	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	**PETITION**
	)	
Respondent.	)	
	)	

The Petitioner, Marko Porter, hereby petitions for dismissal of the Notice of Deficiency issued by the Commissioner of Internal Revenue for the years 1990 and 1991 and as a basis for his Case alleges and avers as follows:

1. The Petitioner can be found in Maricopa County, Arizona at 2196 East Apache, #102-192, Tempe, Arizona 85281.
2. The Notices of Deficiency, copies of which is attached as Exhibits A and B, including all statements of the Commissioner attached thereto, were mailed to the Petitioner on or about November 26, 1993. The Notices were issued by Michael R. Allen, Director, Service Center, in Ogden, Utah.
3. The Deficiency in taxes determined for the year 1990 is $1,823.00; and, for the year 1991 is $694.00.
4. Penalties per section are set forth below:

Year	§ 6651(a)(1)	§ 6654
1990	$ 444.00	$ 116.00
1991	$ 168.00	$ 39.00

5. The determination of tax set forth in said Notice of Deficiency is based upon the following errors:

(a). Error in proceeding as if the income, if there was any, was attributable to the Petitioner as income of an **individual** "citizen or resident of the United States."

(b). Error in proceeding as if the Petitioner's income, if there was any, was derived from sources within the United States.

(c). Error in issuing the Notice of Deficiency without establishing the basis for or making the determination of the existence of the deficiency.

(d). Error in proceeding as if the Petitioner had a "zero" basis (cost) in the labor he sold each day that he worked at Saguaro Tire and Auto Service and Arizona Precision Parts, Inc. during the year 1990.

(e). Error in proceeding as if the Petitioner had a "zero" basis (cost) in the labor he sold each day that he worked at Patrick Sherman and D.J. Partnership during the year 1991.

6. The facts upon which the Petitioner relies, as the basis for his case, are as follows:

(a). During the years 1990 and 1991 the Petitioner was a non-resident alien. Though being found in Arizona he did not establish residence at any time. He has not applied for permanent residence "within the United States" ("**green card**" test), nor was he resident "within the United States" under the substantive presence test.

(b). During the years 1990 and 1991, the Petitioner did not receive any dividends, rents, royalties, interest or other fixed or determinable, annual or periodical income "within the United States", as defined in the Internal Revenue Code (IRC), §871(a) and the regulations promulgated thereunder.

(c). During the years 1990 and 1991, the Petitioner did not receive any income "within the United States" or any income without the United States that was effectively connected with the conduct of a trade or business "within the United States."

(d). During the years 1990 and 1991, the Petitioner did not make an election under IRC, §871(d).

(e). The Petitioner's labor is his property. As a part of his life he receives his labor as a day to day gift from his Creator. The property was received by the Petitioner after December 31, 1920. The Petitioner's Creator is the original owner of this property and the Petitioner's Creator did not receive the property as a gift before giving it to the Petitioner. The Petitioner has been unable to discover the basis (cost) the Petitioner's Creator had in the labor at the time it was given to the Petitioner as a gift. The Secretary has either failed to determine the basis (cost) in the Petitioner's labor as required by Internal Revenue Code (IRC), § 1015(a) or in the alternative the Secretary has been unable to determine the basis (cost) that the Petitioner's Creator had in the gift of the labor that was given to the Petitioner. If the Secretary is unable to determine the basis (cost) of the Petitioner's labor that was received as a gift, the Secretary must proceed as if the basis (cost) is the "**FAIR MARKET VALUE**" of the property based upon the best information available to him as of the date or approximate date that the property was acquired by the original donor or last preceding owner that did not receive it by gift. The only information that would be available to the Secretary to determine the basis (cost) the Petitioner had in his labor would be the amount he received each day he sold his labor.

(f). During the year 1990, the Petitioner sold his labor to Saguaro Tire and Auto Service and Arizona Precision Parts, Inc. each day that he worked. For the year 1990 the Petitioner received $8,411.00 for the sale of his labor to Saguaro Tire. Petitioner had a basis (cost) of at least $8,411.00 in the labor he sold to Saguaro Tire and Auto Service. For the year 1990 the Petitioner received $1,688.00 for the sale of his labor to Arizona Precision Parts, Inc. Petitioner had a basis (cost) of at least $1,688.00 in the labor he sold to Arizona Precision Parts, Inc.

(g). During the year 1991, the Petitioner sold his labor to Patrick Sherman and D.J. Partnership on each day that he worked. For the year 1991 the Petitioner received $8,216.00 for the sale of his labor to Patrick Sherman. Petitioner had basis (cost) of at least $8,216.00 in the labor he sold to Patrick Sherman. For the year 1991 the Petitioner received $1,539.00 for the sale of his labor to D.J. Partnership. Petitioner. Petitioner had a basis (cost) of at least $1,539.00 in the labor he sold to D.J. Partnership.

RELIEF SOUGHT

WHEREFORE, the Petitioner respectfully requests and lawfully demands that this Court:

A. Dismiss the Commissioner's Notice of Deficiency; and,

B. Declare that the Petitioner is a non-resident alien under the internal revenue laws; or in the alternative,

C. Declare that IRC, §1015(a) would generally establish a presumption that a Man has a basis (cost) equal to or greater than the amount he received for the sale of his labor.

D. Declare that the Respondent has the burden of proof of showing that the Petitioner had a basis (cost) other than a basis (cost) equal to or greater than the amount he received for the sale of his labor; and,

E. Declare that the Petitioner had a basis (cost) equal to or greater than the amount he received for the sale of his labor during the years 1990 and 1991; and,

F. Issue a written memorandum decision declaring that there was no Deficiency in income taxes; and,

G. Grant such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this _____ day of April, 1994.

/s/ Marko Porter

MARKO PORTER
c/o 2196 East Apache #102-192
Tempe, Arizona 85281

Petitioner, In Pro Per

VERIFICATION

I, Marko Porter, declare and verify under the penalty of perjury under the laws of the United States of America, that I am the Petitioner herein, that I have read the foregoing and it is true and correct.

Date _____ _____
Marko Porter

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UNITED STATES TAX COURT
Washington, D.C. 20217

MARKO A. PORTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 3633-94.
	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
	)	
Respondent.	)	

ANSWER TO AMENDED PETITION

THE RESPONDENT, in answer to the amended petition filed in the above-entitled case, admits and denies as follows:

1. Admits.
2. Admits.
3. Admits.
4. Admits.
5. (a). through (e). Denies respondent erred as alleged.
6. (a). through (g). Denies.
7. Denies generally each and every allegation of the petition not herein specifically admitted, qualified or denied.

WHEREFORE, it is prayed that respondent's determination, as set forth in the notice of deficiency, be in all respects approved.

DAVID L. JORDAN
Acting Chief Counsel
Internal Revenue Service

Date: May 20 1994 By /s/ David W. Otto
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